

83-230

CASE NO. _____

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ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES GUARD, RICHARD H. WITKER, KARL
C. DETWILER, ELEANOR ULLUM, WILLIAM H.
KAUFMAN, GILBERT A. JARRARD, JAMES
LeFEVERS, WILLIAM E. BUNCE, JOHN H.
DUNCAN, JAMES W. McCLAIN, WARREN S.
McCORMICK, NEAL D. BRONSON, GRACE
KERSEY, RONALD FERRELL, CITY OF LEBANON,
Petitioners,

vs.

LESTER R. KILBURN,
Respondent.

ON WRIT OF CERTIORARI TO THE
OHIO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is it proper for a court to hold a hearing on the issue of whether a discharged, untenured public employee is entitled to a name clearing hearing when the public employer, gives no reason for the discharge and does not disseminate any false and defamatory information about the employee?

III.

TABLE OF CONTENTS

	Page
GROUND FOR JURISDICTION OF THE SUPREME COURT	1
OPINIONS BELOW	2
STATEMENT OF CASE	2
A. Procedural History and Posture of the Case	2
B. Statement of Facts	4
ARGUMENT FOR ALLOWANCE OF THE WRIT	6
An Untenured Public Employee Does Not Have A Right To A Name Clearing Hearing Upon Termination Of His Employment When The Public Employer Gives No Reason For The Discharge And Does Not Disseminate Any False And Defamatory Information About The Employee.	
FACTORS REQUIRING THAT THIS COURT TAKE THIS CASE IN	9

IV.

APPENDIX

CASES:	.Page
Supreme Court of Ohio Case No. 82-904	1a
Twelfth Appellate District of Ohio Decision	12a
Decision of Judge P. Daniel Fedders	18a
Fourteenth Amendment	21a
Assignment of Error No. 1	21a
42 U.S.S. Section 1983	22a

TABLE OF AUTHORITIES

CASES:	Page
<i>State ex rel. Kilburn, Appellee v. Guard, et al.,</i> <i>Appellants</i> , 5 O. St. 2nd 21, 5 O.B.R. 81	2
<i>Owen v. City of Independence, Missouri</i> , (1980), 445 U.S. 622	5
<i>Codd v. Velger</i> , 429 U.S. 624, 628	6, 8, 9
<i>Bishop v. Wood</i> , 426 U.S. 341, 348-9 (1976)	7, 8, 9

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GROUND FOR JURISDICTION OF
THE SUPREME COURT

Petitioners seek review of the Ohio Supreme Court's decision dated May 18, 1983. This Supreme Court has jurisdiction to review the judgment under 28 U.S.C. 1257 (3) in that a right was specially set up and claimed under

the U. S. Constitution and 42 U.S.C. Section 1983 by the Respondent. This Court should grant the Petition for Writ of Certiorari, because the State Court decided a federal question in a manner which conflicted with the applicable decisions of this Court. (See Rule 17.1 (c) of the Rules of this Court.)

OPINIONS BELOW

The decision of the Ohio Supreme Court was published under the name of *State ex rel. Kilburn, Appellee v. Guard, et al., Appellants*, 5 O. St. 2d 21, 5 O.B.R. 81, decided on May 18, 1983. The decisions of the Twelfth Appellate District Court of Ohio dated April 28, 1982 and the decision of the Warren County Court of Common Pleas dated December 19, 1979 were not published. All three decisions are set forth verbatim in Appendix.

STATEMENT OF CASE

A. Procedural History and Posture of the Case.

In August, 1979, Respondent (Plaintiff in the Ohio trial court and "Plaintiff" hereafter), Lester Kilburn, filed a Complaint containing five causes of action, as to his discharge in January, 1979 as Chief of Police of the City of Lebanon, Ohio, by the Petitioner ("Defendant" hereafter). It consisted of an application for writ of mandamus and damages on grounds of alleged civil service law violations and claims for relief under the U.S. and Ohio Constitutions. The action was filed in Ohio's Warren County Court of Common Pleas. The application for mandamus was denied on October 16, 1979 by the trial court. The Defendant then filed a Motion for Summary Judgment which was granted and the case was dismissed on January 2, 1980.

The Plaintiff appealed those decisions to the Warren County Court of Appeals on January 18, 1980. The Plaintiff set out two Assignments of Error:

1. He had been denied his rights under 42 U.S.C. Section 1983 (Federal Civil Rights Act) to a "name clearing hearing."

2. The Trial Court erred in denying him his writ of mandamus on the alleged violation of his Civil Service rights under Ohio law.

The Court of Appeals in a decision dated April 28, 1982 reversed the granting of Summary Judgment on the First Assignment of Errors and affirmed the decision of the Trial Court on the Ohio Civil Service claim contained in the Second Assignment of Errors.

The defendants then appealed the reversal on the first issue to the Supreme Court of Ohio. That Court allowed the case in for argument and briefing. The second issue on the Ohio Civil Service matters was not appealed by the plaintiff. As a result, the only issue before the Ohio Supreme Court was the alleged denial of the name clearing hearing under 42 U.S.C. Section 1983. The Supreme Court of Ohio in a 4 to 3 decision affirmed the decision of the Court of Appeals and sent the case back to the Trial Court, in order "to afford plaintiff an opportunity to demonstrate his entitlement to a Fourteenth Amendment due process hearing and to maintain a civil action under Section 1983 for damages . . ." (App. 7a) The decision was a plurality decision for three judges, with one judge merely concurring "in judgment only." The plaintiff asserted U.S. Constitutional rights vaguely in the Third Count of his Complaint, and then discussed his right to some sort of hearing in his response to Defendants' Motion for Summary Judgment. His memorandum was ac-

accompanied by his Affidavit filed in support thereof. In his Assignment of Errors to the Court of Appeals, he alleged in his First Assignment that he had been deprived of his reputation and given no hearing in violation of 42 U.S.C. Section 1983. Both the Ohio Supreme Court and the Court of Appeals implicitly found that the issues had been raised below and as a result this Court has jurisdiction to review the judgment of the Ohio Supreme Court on a writ of certiorari. We have attached a copy of the Assignment of Errors in the Appendix (App. 21a) and the decisions of the Trial Court, the Court of Appeals and of the Supreme Court establishing that the issue was raised.

B. Statement of Facts.

Lester Kilburn, Plaintiff-Appellant ("Plaintiff") became a police officer for the Defendant, Lebanon, Ohio Police Department, in 1957. In 1960, the Defendant, City of Lebanon, adopted its Charter. After several promotions (for which he took promotional exams), Kilburn became Chief of Police in 1968, but without his taking any Civil Service promotional exam. He served as Chief of Police until his termination on January 3, 1979 by order of the Defendant Charles Guard, who was then City Manager.

The Charter of the City of Lebanon exempted the position of Police Chief from Civil Service. As a result, the Chief's position was not classified or tenured and he served at the will of the City Manager. That was the holding of the Trial Court below which was affirmed by the Court of Appeals. No cross appeal was filed on that issue by Kilburn.

The only thing in the record to support Kilburn's claim to a name clearing hearing was a paragraph in his Affi-

davit in opposition to Defendants' Motion for Summary Judgment, which paragraph read as follows:

"1. That his (Plaintiff's) reputation has been damaged by his being fired, without reasons given by defendant Charles Guard in that he has received a great deal of unwanted and unneeded publicity which speculates in a manner which is damaging to his integrity and honesty."

The Court of Appeals acknowledged that plaintiff's Complaint did not allege facts which would warrant granting plaintiff a right to a name clearing hearing, but it held that the allegations of the aforementioned paragraph were sufficient to bring him within the jurisdictional doctrine set out in the case of *Owen v. City of Independence, Missouri*, (1980), 445 U. S. 622.

The plurality decision of the Supreme Court of Ohio, in affirming the decision of the Court of Appeals, stated: (App. 6a)

Taken together, and in light of the peculiar quality of public trust vested in a chief of police, these averments raise the issue of whether the deliberate silence of the city and its officials concerning the reasons for Kilburn's dismissal may constitute an employer created and disseminated false and defamatory impression about Kilburn in connection with his termination, so as to infringe on his right to liberty. Given this genuine issue of material fact, summary judgment was inappropriate.

ARGUMENT FOR ALLOWANCE OF THE WRIT

An Untenured Public Employee Does Not Have A Right To A Name Clearing Hearing Upon Termination of His Employment When The Public Employer Gives No Reason For The Discharge and Does Not Disseminate Any False and Defamatory Information About The Employee.

The uncontradicted record in this case at this time is as follows:

1. Kilburn, as the City's Chief of Police, had an untenured, non-classified job.
2. It was stipulated that, when he was terminated by the City Manager, he was given no reason for his termination.
3. There was nothing in the record indicating that any City of Lebanon official released any information, publicly or otherwise, that was false, defamatory or stigmatizing about Kilburn at the time of his termination.

The requisites established by this Supreme Court of the United States for a non-tenured government employee to have a "name-clearing hearing" upon termination are as follows:

1. The creation by the government employer, and
2. The dissemination by the government employer of
3. False and defamatory impressions about the government employee who has been terminated.

To that effect, see *Codd v. Velger*, 429 U. S. 624, 628:

"Only if the employer creates and disseminates a false and defamatory impression about the employee in

connection with his termination is such a hearing required."

Also see *Bishop v. Wood*, 426 U. S. 341, 348-9 (1976). where this Court held that the termination of public employment can make the public employee "less attractive to other employers," but if the reasons of the public employer are "* * * not made public * * * [they] cannot properly form the basis for a claim that * * * [one's] interest in his 'good name, reputation, honor or integrity' * * * was thereby impaired.

The Ohio appellate courts in our case acknowledged that there was nothing in the allegations of the Complaint of Kilburn which brought him within the above test. The only thing found in this record was the paragraph in Kilburn's affidavit in opposition to defendant's Motion for Summary Judgment which read as follows:

"1. That his (Plaintiff's) reputation has been damaged by his being fired, without reasons given by defendant Charles Guard in that he has received a great deal of unwanted and unneeded publicity which speculates in a manner which is damaging to his integrity and honesty."

That allegation does not fit within the three-fold test set out above. First, it expressly states that the reason for discharge was not given. Thus no impression was created by the employer. Further, there is no allegation that the employer disseminated anything. The paragraph merely alleges that there was "publicity." It does not allege the source or what the specifics of the publicity were. Clearly, a government employer can not control the media from providing "unwanted and unneeded publicity which speculates in a manner which is damaging . . ." to a public em-

ployee's integrity and honesty. The First Amendment bars public employers from interfering with the media.

Further, there is no allegation that that publicity was "false and defamatory." There was no specification of facts of any kind in that single paragraph except for one, and that is that there was no reason given for the termination by the City Manager, Charles Guard. Thus none of the allegations or facts required by *Codd v. Velger* and *Bishop v. Wood* were shown by plaintiff.

The fact that the Ohio Supreme Court merely seems to be remanding the case to allow the plaintiff to develop his facts should not confuse this Court. Ohio has civil rules of procedure which are almost identical to those in the Federal Rules. In a Rule 56 proceeding on a Motion for Summary Judgment, plaintiff had ample rights and power to develop his facts through depositions, discovery and otherwise at the trial court level. Plaintiff failed to do so. It is now too late in the game to allow plaintiff to do so in view of the flimsy allegations and affidavit that he filed in this case.

This Court has been rigorous in requiring public employees to meet the three-fold test alluded to above. In *Codd v. Velger*, *supra*, a public employee's right to a name clearing hearing was denied because he did not contend that the information disseminated by the employer was false. Thus a failure to meet only *one* of the requisites of the test meant no right to a name clearing hearing. In our case, *none* of the requisites of the three-fold test have been met.

The Ohio Supreme Court's decision patently conflicts with the applicable decisions of this Court when the Ohio Supreme Court held that:

1. "(T)he deliberate silence" of the public employer as to the reasons for the plaintiff's discharge may constitute an employer created and disseminated impression. That flagrantly contravenes the holding of *Bishop v. Wood*, that silence by the public employer bars any claim to a name clearing hearing.

2. None of the three-fold requisites set out in *Codd v. Velger* have to be met by plaintiff in this case.

FACTORS REQUIRING THAT THIS COURT TAKE THIS CASE IN

As we have shown above, this case meets the requisites of the rules of this Court as to the considerations governing review on certiorari. We have shown that the decision of the Ohio Supreme Court conflicts with the applicable decisions of this Court. (See Rule 17.1 (c) of this Court.)

There are serious public policy considerations which have been raised by the result in this case. Both state and federal employers throughout the United States create many untenured and unprotected positions of public employment for perfectly valid reasons. This type of employment helps assure efficiency and flexibility in government policy, without the delay of hearings upon termination. Those factors have now been placed in jeopardy by the Ohio Supreme Court's decision that a public employer's silence can fall within the *Codd* and *Bishop* requisites for a name clearing hearing. This can create an administrative quagmire and a thicket of litigation which are patently contradictory of the policy considerations that this Court was supporting in the two aforementioned cases. To avoid those results, this Court should immediately vacate this decision, or allow it to be briefed and argued.

To allow this case to stand would create problems throughout the United States, and it must be reversed.

Respectfully submitted,

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APPENDIX

THE STATE, ex rel. KILBURN, APPELLEE, v. GUARD et al., APPELLANTS.

(No. 82-904—Decided May 18, 1983.)

5 Ohio St.3d 21

APPEAL from the Court of Appeals for Warren County.

On August 3, 1979, Lester R. Kilburn, appellee, filed this action in the court of common pleas, styled "Application for writ of mandamus, complaint for violation of civil rights, complaint in damages, appeal from a decision of the Lebanon civil service commission and jury demand."

Kilburn joined the Lebanon Police Department in 1957, received regular promotions and was appointed chief in 1968 by the then city manager, Charles Guard. The position of chief of police is exempt from civil service [22] laws, Kilburn having served at the will of the city manager. At the time of his termination on January 3, 1979, no official explanation for the job action was given. The official silence ensued despite Kilburn's request for a statement of the reasons for the discharge and speculation in the media tying the dismissal to a contemporaneous investigation into missing public funds. The civil service commission denied Kilburn a hearing, finding itself without jurisdiction in the matter. Thereafter, Kilburn filed the instant action, joining the Lebanon city council members, civil service commission panel, former and acting city managers, chief of police, and the city itself as defendants.

The trial court granted defendants' motion for judgment on the pleadings and for summary judgment, finding that Kilburn's allegations of deprivation of his "rights, property and reputation" did not give rise to a cause of action for

which compensation could be awarded. The court of appeals reversed, finding an issue of fact for the resolution of the trier-of-fact as to whether the actions of the defendants damaged plaintiff's reputation for integrity and honesty.

The cause is now before this court upon the allowance of a motion to certify the record.

Turrell & Phillips Co., L.P.A., Mr. Roger B. Turrell and Mr. Stanley S. Phillips, for appellee.

Bauer, Morelli & Heyd Co., L.P.A., Mr. Arnold Morelli and Mr. J. William Duning, for appellants.

Per Curiam. This appeal is brought from the grant of summary judgment by the trial court. Summary judgment is appropriate only when it appears from the record before the court that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Civ. R. 56(C). Here, plaintiff seeks a name clearing hearing to refute charges arising from the termination of his employment as chief of police. Such a name clearing hearing is mandated in certain circumstances by the Fourteenth Amendment to the United States Constitution. A civil action for damages is available pursuant to the Civil Rights Act of 1871, as amended, Section 1983, Title 42, U. S. Code. These protections exist for the benefit of public employees whose discharge would otherwise stigmatize their reputation without due process of law. See, e.g., *Board of Regents v. Roth* (1972), 408 U. S. 564; *Codd v. Velger* (1977), 429 U.S. 624.

Procedural due process requires notice and an opportunity to be heard "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him * * *." *Wisconsin v. Con-*

stantineau (1971), 400 U.S. 433, 437. "The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny his future employment for other reasons." *Board of Regents, supra*, at 573, fn. 12.

This protection is founded on either the "property" or "liberty" component [23] in the Fourteenth Amendment's guarantee of liberty and property rights. "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State * * * subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' is liable for damages under Section 1983, Title 42, U. S. Code. It is established that these words were intended to encompass municipal corporations as well as natural 'persons.'" *Monell v. New York City Dept. of Social Services* (1978), 436 U. S. 658.

Accordingly, a claim to a name clearing hearing and for damages is made upon a showing of a deprivation of liberty and/or property. Absent a finding of a property right in continued employment, a name clearing hearing is required only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination so as to infringe on his right to liberty. *Codd, supra*, at 628.

This court, in *State, ex rel. Trimble, v. State Board of Cosmetology* (1977), 50 Ohio St. 2d 283 [4 O.O. 3d 447], rejected a public employee's asserted right to a name clearing hearing on her termination of employment, holding that "[a]n unclassified civil servant is not entitled to the Fourteenth Amendment due process protection of a hear-

ing before discharge when her asserted property interest in continued employment consists of one favorable job evaluation and permanent employee status and when her alleged liberty interest in reputation and future job opportunities is threatened by a discharge for 'behavior and performance in the past' and by a reprimand for behavior on one occasion."

As observed by Justice William B. Brown, to have a liberty interest needing the protection of a hearing, a discharged employee must suffer "allegations * * * sufficiently damaging to hurt * * * [her] reputation in the community or to foreclose her future employment opportunities." *Trimble, supra*, at 287. Leona Trimble, an employee in the unclassified service of the State Board of Cosmetology, received both a letter of reprimand one month prior to her termination and a letter which attributed the job action to her "behavior and performance in the past * * *." Considering the impact of both letters on her reputation, we concluded that Trimble's liberty interest was not violated.

In this case, defendants made no allegations at the time of Kilburn's termination, choosing to remain silent as to the reasons for the decision to fire him. In his appeal. Kilburn raises only the infringement of his liberty interest, i.e., that his employer created and disseminated a false and defamatory impression in connection with his termination, entitling him to a name clearing hearing and possible civil damages.

At the time the trial court granted defendants' motion for summary judgment on January 2, 1980, based upon "pleadings, affidavit, stipulations, exhibits, argument and memoranda of counsel in this action," it had before it [24] certain relevant documents. Most significant was Kilburn's affidavit which read:

"LESTER KILBURN, first duly cautioned and sworn deposes and says that he has personal knowledge of these facts and states as follows:

"1. That his reputation has been damaged by his being fired, without reason given, by defendant Charles Guard in that he has received a great deal of unwanted and unneeded publicity which speculates in a manner which is damaging to his integrity and honesty.

"2. That his employment opportunities have been greatly foreclosed by defendant Guard's action in that after 22 years as a police officer and chief of police with a spotless record, he has applied for a position either as chief of police, police officer, security officer, or insurance claims examiner in at least 12 instances unsuccessfully; that some of these prospective employers were Economy Fire and Casualty Insurance Company, Dayton Tire and Rubber Company, Doylestown, Ohio, Ohio, Sabrino, Ohio and Wayne Township, Montgomery County, Ohio.

"3. That affiant believes that the manner and circumstances of his discharge by defendant Guard were the reason for his loss of reputation and foreclosed employment opportunities.

"Further affiant sayeth not."

Also significant was the following allegation made in Kilburn's "reply memorandum contra defendants' motion for summary judgment";

"Hanging over Lester Kilburn is the spector [*sic*] of the well publicized 'investigation' which has now [December 1979] been taking place almost a year. The city attorney has promised, repeatedly, that the investigation report would be made and that copies of it would be given those directly affected. We have seen nothing except newspaper

publicity. At present, Lester Kilburn is in a position where he has been fired under circumstances where defendants have placed a cloud over him. The defendants without ever stating one way or the other, know that his attempts to get employment, his attempts to practice his trade or profession are seriously jeopardized. Where does this leave Lester Kilburn?"

Taken together, and in light of the peculiar quality of public trust vested in a chief of police, these averments raise the issue of whether the deliberate silence of the city and its officials concerning the reasons for Kilburn's dismissal may constitute an employer created and disseminated false and defamatory impression about Kilburn in connection with his termination, so as to infringe on his right to liberty. Given this genuine issue of material fact, summary judgment was inappropriate.

Although Kilburn has not yet demonstrated his right to a full due process name clearing hearing, given allegations that the city damaged his reputation, he is entitled to an evidentiary hearing in the trial court to determine whether he has a right to such a full name clearing hearing. While Kilburn did not demonstrate that any allegations of malfeasance or misfeasance were promulgated by city officials, we find that by granting defendants' motion [25] for summary judgment, the trial court prematurely foreclosed proof on those issues. Given the official silence and widespread speculation in the press, we cannot say on the basis of the record before us that Kilburn's liberty interest was not violated by the city and its officials. Upon further development of the facts surrounding his discharge, it may be demonstrated that defendants' actions sufficiently damaged Kilburn's reputation in the community or foreclosed his future employment opportunities to warrant a full name clearing hearing.

Accordingly, in order to afford plaintiff an opportunity to demonstrate his entitlement to a Fourteenth Amendment due process hearing and to maintain a civil action under Section 1983 for damages the judgment of the court of appeals which reversed the trial court's summary judgment for defendants is affirmed, and the cause is remanded to the trial court for further proceedings in accordance with law.

Judgment affirmed.

HOLMES, C. BROWN and J. P. CELEBREZZE, JJ., concur.

LOCHER, J., concurs in judgment only.

CELEBREZZE, C.J., W. BROWN and SWEENEY, JJ., dissent.

WILLIAM B. BROWN, J., dissenting. Because I believe the majority has unnecessarily subjected public employers to potential liability for routine administration of personnel matters, I respectfully dissent.

The effect of the majority's decision is to afford a discharged, nonclassified public employee a hearing whenever that employee alleges that the public employer remained silent as to the reasons for the discharge in the presence of unfavorable publicity. Such a result is neither mandated by case law precedent nor warranted by public policy considerations.

The United States Supreme Court held in *Codd v. Velger* (1977), 429 U.S. 624, 627-628, that a non-tenured employee who has been stigmatized by his discharge from employment is entitled to a hearing " * * * to provide the person an opportunity to clear his name' * * * [o]nly if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination * * *."

This test was applied as follows by that court in *Owen v. Independence* (1980), 445 U. S. 622, 633-634, at fn. 13:

“• • • [T]he city — through the unanimous resolution of the City Council — released to the public an allegedly false statement impugning petitioner’s honesty and integrity. Petitioner was discharged the next day. The Council’s accusations received extensive coverage in the press, and even if they did not in point of fact ‘cause’ petitioner’s discharge, the defamatory and stigmatizing charges certainly ‘occur[red] in the course of the termination of employ- [26] ment.’ Cf. *Paul v. Davis*, 424 U. S. 693, 710 (1976). Yet the city twice refused petitioner’s request that he be given written specification of the charges against him and an opportunity to clear his named. Under the circumstances, we have no doubt that the Court of Appeals correctly concluded that the city’s actions deprived petitioner of liberty without due process of law.”

The majority found, as appellee so urged, that the statements in appellee’s affidavit in opposition to appellant’s motion for summary judgment, most notably the one that follows, raised a material issue of fact within the rule of *Owen, supra*:

“1. That his reputation has been damaged by his being fired, without reasons given • • • in that he has received a great deal of unwanted and unneeded publicity which speculates in a manner which is damaging to his integrity and honesty.”

Contrary to the majority’s finding, this allegation, in my opinion, is insufficient to bring this case within the rule of *Codd-Owen*. First, the public employer herein was silent as to the reasons for the discharge. It neither created nor disseminated any information whatsoever regarding the discharge. These facts are in marked contrast to those of

Owen, where the public employer accused the police chief of theft, implied drug dealings and bribery, released pertinent investigation reports to the press, and requested a grand jury investigation. The silence of the employer is outcome determinative, for as the United States Supreme Court noted in *Bishop v. Wood* (1976), 426 U. S. 341, 348, the termination of public employment can make the public employee "less attractive to other employers," but if the reasons of the public employer are " * * * not made public * * * [they] cannot properly form the basis for a claim that * * * [one's] interest in his 'good name, reputation, honor or integrity' * * * was thereby impaired.

Secondly, and as in *Codd*, the employee herein made no allegations that the information regarding the discharge was false or defamatory. Appellee retorts that since the appellant did not state reasons for his discharge, he could not develop information to formulate "allegations of specific misconduct." This assertion, however, ignores the facts that appellee never raised the issue of "official misconduct" as a question of fact nor sought, pursuant to discovery rules, to obtain proof of such conduct. The absence of such an allegation is fatal to appellee's claim, for " * * * if the hearing mandated by the Due Process Clause is to serve * * * [its purpose of providing the person with an opportunity to refute the charge, then], there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation." *Codd, supra*, at page 627.

The result reached by the majority herein is curious in light of this court's recent holding in *Smith v. Fryfogle* (1982), 70 Ohio St. 2d 58, 62-63 [24 O.O.3d 114]. This court, in a unanimous decision, found that "the comments of a single, non-participating trustee, made after the official meeting, do not constitute an act of the board; we conclude

that the board of trustees did not injure appellant's [fired township police chief's] reputation * * *." Indeed, [27] the facts in *Smith* were more compelling and more closely resembled those in *Owen* than those presented herein. Since this court was satisfied that no liability interest had been infringed upon in *Smith* in the face of negative public statement by a township official, then it should likewise be satisfied that no due process right was violated when, as here, the public officials involved made no comments whatsoever.

The majority's position conveniently loses sight of one crucial fact: pursuant to the terms of the city charter, the police chief serves "at will." The majority has cited no statute or other controlling precedent which would, under the facts of the instant case, limit the employment-at-will doctrine. Hence, the city was under no obligation to state the reasons for the discharge as long as it refrained from creating any impression with regard to the discharge by releasing false or defamatory information with respect to the discharge.

There is little doubt that whenever a public servant's at-will employment is terminated, there will be adverse inferences and speculations. Under the majority's analysis, the removal or dismissal of any public employee employed at will which is reported by the press will seemingly require a hearing. In effect, the majority has done away with at-will employment in Ohio, for the majority mandates that a public employer provide justification for all discharges. This is indeed antithetical to at-will employment. This result clearly defeats the purpose of having certain public employees in non-civil service status and hence runs counter to sound public policy.

Under proper circumstances, a nonclassified public employee has a right to a name clearing hearing. In the

instant case, however, the employee simply failed to plead sufficient facts demonstrating his entitlement to a name clearing hearing, and I would thus reverse the decision of the court of appeals which afforded such a hearing.

CELEBREZZE, C. J., and SWEENEY, J., concur in the foregoing dissenting opinion.

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY, OHIO

CASE NO. 409

STATE, EX REL., LESTER KILBURN
Plaintiff-Appellant,
vs.
CHARLES GUARD, ET AL.
Defendants-Appellees.

MEMORANDUM DECISION AND
JUDGMENT ENTRY

[Filed April 28, 1982]

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Mr. J. William Duning, Lebanon City Building, Broadway at Main Street, Lebanon, Ohio 45036, for Defendants-Appellees.

PER CURIAM

This cause came on to be heard upon the appeal, transcript of the docket, journal entries and original papers from the Court of Common Pleas of Warren County, Ohio, transcript of proceedings, briefs and oral arguments of counsel.

Now, therefore, the assignments of error having been fully considered, are passed upon in conformity with App. R. 12 (A) as follows:

Appellant, the former chief of police for the City of Lebanon, was terminated January 8, 1979, by appellee, city manager, without a hearing to determine whether there was "just cause." Appellant had commenced employment in 1957 and had become chief of police in 1968. It was alleged in oral arguments that the discharge was attended by a great deal of publicity and public comment.

Within seven (7) days of his dismissal, appellant filed an appeal before the Civil Service Commission in an attempt to obtain a hearing. The Commission refused to hear the appeal, claiming it lacked jurisdiction.

Following the Commission's refusal, appellant filed a five-count complaint which included an application for a writ of mandamus. The writ was denied October 16, 1979, and the parties have agreed that the fifth count in the complaint is moot. The trial court granted appellees motion for summary judgment and motion for judgment on the pleadings and a timely notice of appeal was filed.

Appellant has asserted the following assignments of error;

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ERRED IN SUSTAINING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN DISMISSING PLAINTIFF'S COMPLAINT WHERE PLAINTIFF PLEADS A DEPRIVATION OF RIGHTS OF PROPERTY AND REPUTATION AND IS GIVEN NO HEARING TO ATTEMPT TO SHOW SUCH DEPRIVATION PURSUANT TO 42 U.S.C.A. SECTION 1983.

ASSIGNMENT OF ERROR NO. 2:

THE TRIAL COURT ERRED IN NOT GRANTING PLAINTIFF-RELATOR'S APPLICATION FOR WRIT OF MANDAMUS.

Relative to the first assignment of error, appellant cites *Owen v. City of Independence, Missouri* (1980), 445 U.S. 622, 100 S.Ct. 1398. That case held that a police chief was denied "liberty" without due process of law when the city released allegedly false statements which impugned the officer's honesty and integrity and then discharged him without giving him specifications of the charges and an opportunity to clear his name. This cause of action is cognizable in a 42 U.S.C. Section 1983 claim. The cause is for damage to reputation and is not based upon a property interest in employment.

The complaint *sub judice* does not allege facts in line with *Owen*; however, the complaint alleged damage to reputation, in the third cause of action, to wit:

• • •

That such conduct deprives the plaintiff of his rights, property and reputation, protected by the Constitution of the United States and of Ohio.

Lester Kilburn's affidavit, attached to plaintiff's reply memorandum contra defendants' motion for summary judgment, states the following pertinent allegations:

1. That his reputation has been damaged by his being fired, without reasons given, by defendant Charles Guard in that he has received a great deal of unwanted and unneeded publicity which speculates in a manner which is damaging to his integrity and honesty.

That allegation brings appellant squarely within the rule pronounced in *Owen* and presents an issue of fact for the resolution of the trier-of-the-fact. Accordingly, the first assignment of error is well taken.

Relative to the second assignment of error, we note initially that the Lebanon City Charter expressly excludes the chief of police from classified civil service. *State ex rel. Lynch v. City of Cleveland* (1956), 164 Ohio St. 437, 132 N.E.2d 118, is authority for their legal right to do so and that case held in its syllabus:

1. Under the provisions of Section 3 of Article XVIII of the Constitution of Ohio, municipalities have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.

2. Under those constitutional provisions a municipality is authorized to choose its own method of selecting its own chief of police other than from a civil service eligible list.

Those cases cited by appellant are inapposite to the establishment of a right to a hearing when there is no property interest in the employment. Inasmuch as appellant was not in the civil service, he was not entitled to

rights thereunder. Section 133.01 (a) of the Lebanon Administrative Code specifies that the city manager shall have the power to discharge "at will any subordinate employee" Accordingly, the second assignment of error is not well taken.

The assignments of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, reversed and this cause is remanded for further proceedings.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Warren County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellees, by their counsel, except.

HENDRICKSON, P.J., and KOEHLER, J.

JONES, J., Not Participating.

17a

IN THE COURT OF APPEALS
OF WARREN COUNTY, OHIO

Case No. 409

STATE OF OHIO, EX REL.,
LESTER KILBURN,

Appellant,

vs.

CHARLES GUARD, ET AL.,

Appellees.

ENTRY

[Filed May 28, 1982]

This Court, having duly considered appellees' MOTION FOR RECONSIDERATION, and having found the same to be not well taken, hereby denies said motion.

/s/ HENDRICKSON, J.
William R. Hendrickson,
Presiding Judge

STATE OF OHIO, WARREN COUNTY, OHIO
COMMON PLEAS COURT

CASE NO. 41248

STATE, ex rel., LESTER R. KILBURN,
Relator-Plaintiff,

vs.

CHARLES GUARD, et al.,
Respondents-Defendants.

DECISION

[Filed December 19, 1979]

This matter is before the Court upon the defendants' motion for judgment on the pleadings and for summary judgment. For purposes of these motions, the Court has before it the pleadings, the affidavits filed in the context of the motion, and the stipulations of fact previously placed on record.

The Court's decision of October 16, 1979, has disposed of the issues raised in the plaintiff's first cause of action. Plaintiff concedes that his fifth cause of action has become moot and it has been withdrawn. Therefore the present motions pertain only to the second, third and fourth causes of action as set out in the complaint.

In the plaintiff's second cause of action, he contends that various officials of the city of Lebanon failed to follow certain procedural steps in terminating plaintiff's employment and that these procedural steps are mandated by

statute and by municipal ordinance. We have already determined in our prior decision in this matter that the procedural steps described by the plaintiff are not mandated by law and that the failure of the municipal officials to conform to the suggested procedure was not illegal. Therefore, we must hold that the plaintiff's second cause of action fails as a matter of law.

In his third and fourth causes of action, the plaintiff contends that the conduct of the various defendants has deprived him of his "rights, property and reputation". Plaintiff argues firstly that the fact that the city has terminated his employment without publicly stating the reasons for said termination has impaired his ability to obtain new employment. For this he seeks compensatory damages.

Our review of the cases of *Bishop vs. Woods*, 426 U.S. 341 and *Board of Regents vs. Roth*, 408 U.S. 564, compel us to the conclusion that plaintiff's allegations in this regard do not give rise to cause of action for which compensation can be awarded.

Plaintiff also claims that the actions of the defendants may deprive him of "property" because, depending upon future events, his eligibility to receive pension benefits eight years from now may be jeopardized. Plaintiff apparently concedes that the defendants' failure to announce a reason for his dismissal would not in and of itself jeopardize his pension. Plaintiff contends however, that if the city announces its reasons for his dismissal before plaintiff reaches age fifty-two (52), and if said reasons include "dishonesty, cowardice, intemperate habits, or conviction of a felony" (Section 742.37 (C) (6) Revised Code), and if said reasons were accepted as true by the board of trustees of the police and firemens pension fund, he could then be deprived of his pension. Plaintiff's fears, regardless of how well founded they may or may not be, are, at

this point in time, merely conjectural. He will have to await the occurrence of the above described events, at which time appropriate remedial action will be available to him. At present, his action is premature and does not form the basis upon which compensatory relief can be awarded.

For all of the above reasons, it is the conclusion of the Court that the defendants' motion for judgment on the pleadings and for summary judgment is well taken and they will be sustained. Counsel for defendant shall prepare the appropriate judgment entry.

/s/ P. DANIEL FEDDERS
Judge.

cc: Roger B. Turrell
Arnold Morelli

AMENDMENT XIV (1868)

SECTION 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**FOURTEENTH AMENDMENT OF THE U.S.
CONSTITUTION**

**ASSIGNMENT OF ERRORS
IN COURT OF APPEALS**

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COUR ERRED IN SUSTAINING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN DISMISSING PLAINTIFF'S COMPLAINT WHERE PLAINTIFF PLEADS A DEPRIVATION OF RIGHTS OF PROPERTY AND REPUTATION AND IS GIVEN NO HEARING TO ATTEMPT TO SHOW SUCH DEPRIVATION PURSUANT TO 42 U.S.C.A. SECTION 1983.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN NOT GRANTING PLAINTIFF-RELATOR'S APPLICATION FOR WRIT OF MANDAMUS.

42 U.S.C. SECTION 1983**Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.